Filed 4/28/17 P. v. Matteucci CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JARED ANTHONY MATTEUCCI, et al.,

Defendants and Appellants.

F070491

(Super. Ct. Nos. VCF260283A and VCF260283B)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant Jared Anthony Matteucci.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant Dustin Amble Benson.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Nicholas M. Fogg, Deputy Attorneys General, for Plaintiff and Respondent.

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Jared Anthony Matteucci and Dustin Amble Benson were arrested after police executing a search warrant on July 8, 2011 discovered they were growing numerous marijuana plants at their Porterville home and at a second location in the foothills. On November 2, 2011, Benson, who was out of custody on bail, and another individual mailed a package containing marijuana to Ohio.

Both defendants were charged with the following crimes, which were alleged to have occurred on July 8, 2011: cultivation of marijuana (Health & Saf. Code,[1] former § 11358; count 2); manufacture of concentrated cannabis through chemical extraction (§ 11379.6, subd. (a); count 4); and possession of concentrated cannabis (former § 11357, subd. (a); count 5). Benson also was charged with the following drug-related crimes: possession of marijuana for sale on July 8, 2011 (former § 11359; count 3); and transportation of marijuana on November 2, 2011 (former § 11360, subd. (a); count 1).[2] For count 1, the People further alleged Benson had transported marijuana while on bail for another felony offense (Pen. Code, § 12022.1, subd. (b).)

The two were tried together before a jury.[3] The jury rejected the defendants' medical marijuana defenses and convicted them of all charges. Matteucci was placed on probation for three years on condition, inter alia, that he serve 365 days in county jail. As to Benson, the trial court imposed and suspended an 11-year, four-month state prison sentence, and placed Benson on five years' probation subject to the condition, inter alia, that he serve 365 days in county jail. The defendants also were ordered to pay various fees, fines, and assessments.

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[1] Undesignated statutory references are to the Health and Safety Code.

[2] Benson was also charged with and convicted of two counts of child endangerment (Pen. Code, § 273, subd. (a)).

[3] Benson admitted the out-on-bail special allegation at the outset of the jury trial.

In addressing defendants' contentions on appeal, we conclude substantial evidence supports defendants' convictions of the manufacture of concentrated cannabis through chemical extraction and Matteucci's convictions of cultivation of marijuana and possession of concentrated cannabis, and that the trial court did not commit prejudicial instructional error. In addition, we reject Matteucci's request that we reduce his sentence pursuant to Proposition 47. We agree with the People, however, that Benson's case must be remanded to the trial court for it to either impose or strike the Penal Code section 12022.1, subdivision (b) enhancement. In all other respects, we affirm.

FACTS

In 2011, Benson had a YouTube channel named "I Grow Medical Top Shelf." On that channel he posted videos depicting himself growing marijuana and offering it for sale. The videos were posted between January and May 2011, but that was not necessarily when the videos were filmed. Based on the resemblance of the persons in the videos, the videos could have been filmed within two weeks or two months of being posted.

One video, entitled "559 Style Trim City," shows marijuana buds being cured on a tray in what appears to be a "dryer" and a person holding a marijuana bud up to the camera. Benson can be heard saying "[t]wo fifty a zip for all you medical patients that are prop 215 legal, get at me, if you're in the Visalia or Bakersfield area, you need some quality medication[.]" Benson listed the available strains of marijuana. "Two fifty a zip" is slang for $250 for an ounce of marijuana. Benson also posted videos using the name "Bluntman." In a video entitled "559 Bluntman Consulting Style," Benson discusses growing marijuana and speaks to Matteucci.

Investigators with the Tulare County Sheriff's Office began viewing these videos in May 2011. From the videos, detectives identified two locations for further investigation: (1) a house on Slaughter Avenue in Porterville (the Slaughter property); and (2) a house on Cedar Brook Trail in California Hot Springs, which is in the foothills

east of Porterville (the Cedar Brook property). Search warrants were served on those two locations on July 8, 2011.

The Slaughter Property

The Slaughter property is a corner lot on which sits a three bedroom house with an attached garage. When the search warrant was served on the morning of July 8, 2011, officers found Benson and his wife, along with their five- and eight-year-old children, inside the house, where they were living. Matteucci also was inside the house; he had been living there rent-free for about eight months. Neither Benson nor Matteucci were employed.

In the backyard, officers found 131 live marijuana plants ranging from four to seven feet tall. The plants were supported by PVC pipe to keep them from drooping. In an enclosed patio, officers found two trays containing 351 small marijuana plants, which were clones with established viable root systems. Hydroponic machines, which supplied water and nutrients to help the plants grow, were under the starter trays. Ultraviolet lights were suspended above each tray. A trim reaper, which is a mechanical means of trimming marijuana buds, also was found. In the experience of the lead detective, Sergeant Buddy Hirayama of the Tulare County Sheriff's Department, such reapers are uncommon in Tulare County; of the thousands of marijuana investigations he had participated in, this was only the third time he had encountered a trimming machine – the other two times, the machine was found on large cultivation sites.

Hirayama testified as an expert on how butane is used to manufacture concentrated cannabis. The process begins by tightly packing a pipe with marijuana. Each end of the pipe is then closed with screw-on caps – one cap has a single hole while the other has multiple holes. A butane container is inserted into the cap with the single hole and the butane is injected into the pipe. As the butane filters down, it freezes and liquefies the contents as it extracts the trichomes from the marijuana. The trichomes contain tetrahydrocannabinol (THC), the active ingredient in marijuana. The contents seep out of

the other end of the pipe onto a glass dish. The butane evaporates leaving the concentrated cannabis, otherwise known as honey oil or ear wax. The concentrated cannabis is sticky and a razor blade can be used to scrape it off the dish.

On the top shelf of a two to four foot high cabinet in Matteucci's bedroom, officers found a Pyrex dish and a razor blade. There was a thin layered coat of dried concentrated cannabis residue in the dish. Four pressurized canisters of butane were found on the lower shelf; at least three of canisters were full. Hirayama opined the dish was used to collect concentrated cannabis through butane extraction.

In an attached storage room behind the garage, detectives found a two to three foot long pipe, which was capped on both ends. The cap on one end had one hole, which was an injection port used to force butane into the tube, while the cap on the other end had six holes. There was marijuana residue in the threads on one end of the pipe. It was unknown how long the pipe had been out there or when it was last used.

Two digital scales were found in a kitchen cabinet. One scale had marijuana particles on top of it. Scales typically indicate the sale of marijuana, as medical marijuana users have little need to weigh it.

A dryer or humidifier was found in the attached garage; it appeared to be the same one used in one of Benson's videos. Officers found a vial on top of the dryer that contained 0.13 grams of honey oil, or concentrated cannabis. Two vacuum sealing machines were found in the home, one in the attached garage and the other in the kitchen. The machines could be used to store marijuana by vacuum sealing, which was depicted in one of Benson's videos.

Detectives found apparently valid medical marijuana recommendations for Benson and his mother, Cindy Benson. Benson's recommendation allowed him to consume two ounces per week and grow up to 90 mature female plants to produce that amount, while Cindy's allowed her to consume one plus ounces per week and grow up to 75 mature

female plants to produce that amount. Another document found at the house declared that Matteucci was Cindy's primary caregiver.

Hirayama calculated that Cindy's permitted use totaled 3.25 pounds of marijuana per year, while Benson's totaled 6.5 pounds per year, and the two together were permitted a total of 165 mature plants. Officers, however, found a total of 482 plants at the Slaughter property, none of which were mature. The 131 plants in the backyard were pre-flowering and had not yet produced marijuana buds. Hirayama estimated they were about two months from coming into maturity and would have produced at least one pound of marijuana per plant. The total weight of the plants taken from the backyards of the Slaughter and Cedar Brook properties was 142 pounds. There was a very small amount of processed flower buds found at the Slaughter property, but it was still in the "blunts portion of it."

Hirayama interviewed Benson, who told him that the house was his, and the marijuana belonged to him and his mother, who lived in Bakersfield. His mother, however, had not been coming to his house because she was immobile due to recent back surgery. Benson confirmed that all of the plants were female. Benson said he took care of the plants. He grew marijuana himself, rather than buy it at a dispensary, because it was cheaper. Benson expected to yield 1/4 to 1/2 pound per plant. Benson said this was his second year growing marijuana.

In a YouTube video entitled "559 Style Ear Wax," someone holds a Pyrex dish up to the light, revealing a sticky residue on the dish, as Benson is heard saying "[g]ot that ear wax you know what I mean." Hirayama asked Benson about the concentrated cannabis that was on the Pyrex dish found at his home and on the video. Benson told Hirayama he bought the dish at a dispensary in Goshen, but police ultimately determined this was not the case. Benson later told Hirayama he had manufactured or made honey oil in the past, but did not state that his production was related to the Pyrex dish.

Hirayama also interviewed Matteucci, who is Benson's and Cindy's cousin. Matteucci said he was Cindy's care provider and some of the marijuana plants at the residence were for her, but they were not specifically designated as such. Matteucci said he was taking care of the outside plants for Cindy. The last time Matteucci saw Cindy was a month before the search, when she came to the Porterville area to visit. Matteucci did not drive her there. Through a series of questions about the nature of care Matteucci provided to Cindy, Matteucci admitted that the only care he provided was taking care of her marijuana plants. He had not yet provided Cindy with any marijuana. Matteucci denied that any of the plants were his or that he was involved in the manufacture of concentrated cannabis or honey oil.

The Cedar Brook Property

A one-story house with an attic sat on the Cedar Brook property. Benson's 17-year-old cousin, Jourdan Patterson, who lived at the house, and two other males who were visiting, were present inside the house when it was searched on the morning of July 8, 2011. In the attic, police found 18 marijuana plants in pots, along with cultivation equipment, a plastic bag containing processed marijuana, and stakes with handwritten descriptions of different marijuana strains. A makeshift greenhouse in the backyard contained 55 marijuana plants. There were 32 additional marijuana plants in pots in a side yard. Benson told police he cared for the plants at the house.

Two medical marijuana recommendations were posted outside the greenhouse. One was for Daniel Bracamontes, who was allowed to have 50 plants, and the other for Miguel or Manuel Rodriquez, who was allowed to have 60 plants. At no point during the police investigation did either of these individuals contact police to claim an interest in the marijuana plants. Police did not find anything at the house that linked Matteucci to it. However one of Benson's YouTube videos, which shows Benson displaying a certain marijuana strain, was filmed at the home's loft and shows Matteucci entering the room.

Benson Mails Marijuana to Ohio

On November 2, 2011, Benson and another man shipped a six-pound package from a FedEx store in Visalia to Ohio. They paid in cash and selected expedited delivery, which are common for persons shipping marijuana. While the other man did most of the talking, the clerk thought Benson "was the one who made the choices." The clerk flagged the package as suspicious. FedEx called a special agent from the Department of Justice who found a little over three pounds of marijuana inside.

Benson later denied to police that he had ever shipped marijuana out of state. He told police he gave someone he knew only as "P" a ride to the FedEx store, and he knew only one person in Ohio, who went by the YouTube user name "Clock and Cash." In at least three YouTube videos, Benson referenced Ohio, "P" or "Clock and Cash."

A Later Search Uncovers More Marijuana

On November 15, 2011, officers again searched the Slaughter and Cedar Brook properties. Benson, Matteucci and Patterson were at the Slaughter property. Officers found a suitcase containing marijuana weighing slightly less than a pound on a shelf in the closet of Benson's bedroom. Marijuana and shake marijuana were also found on top of the dresser and in a dresser drawer in Benson's bedroom. In the garage, officers found black trash bags that contained shake marijuana and items relating to the production of concentrated cannabis, namely agricultural strain bags that can be used to make bubble hash using the ice water method, which involves combining ice, water, and marijuana or shake, and straining it several times to extract THC. Some of Benson's YouTube videos show him making hash using that method. Officers also found a vial containing approximately a gram of concentrated hash.

At the Cedar Brook property, officers found 269 marijuana plants, seven trash bags containing marijuana clippings, and a medical marijuana recommendation for Benson. Benson told officers he had no involvement with those plants.

Defense Testimony

At trial, Benson testified he believed he was in a collective with his friends and family, although the collective did not have a "set" membership. The members of the collective on July 8, 2011 were Danny Bracamontes, Daniel Rodriguez, Cindy Benson, Benson's uncle Chris Patterson, Lorenzo Avila, Matteucci, and Benson. Benson said his mother got a primary caregiver designation for Matteucci because Benson knew that only qualified patients and primary caregivers were able to participate in a collective.

The collective was not formally established as a non-profit and it was not incorporated or registered with the state as a cooperative. The members of the collective did not have to sign an agreement to join; Benson believed a verbal agreement was legally acceptable. The only membership records were copies of the members' current medical recommendations, which Benson checked against an online database before he provided marijuana to a member. Benson denied earning a profit and said he was reimbursed only for his expenses, although he did not keep close track of those expenses and did not provide an accounting or statement of expenses to other members. Benson said it was typical for members to give him monetary donations, although some people would donate equipment or time. Benson used the money to purchase clones, soil, nutrients, and soil water, as well as to pay his rent and buy his food.

Benson said the YouTube videos were an attempt to teach others how to grow their own medical marijuana. He began uploading videos to YouTube in 2007, and had uploaded 230 videos; about two-thirds of them dealt with growing medical marijuana. Benson explained when he said "250 a zip" in one video, he was referring to medical marijuana patients who were out of medicine and explained that if they needed to find medicine "you can get a hold of me and pretty much it is $250 donation for an ounce of marijuana." Benson said no one took him up on his offer. Benson denied this was a price tag for the marijuana and said it was the cost of reimbursing him for his cost of production.

Benson admitted making concentrated cannabis using the olive oil, cold water, and vegetable glycerin extraction methods, as he preferred to consume marijuana through edibles. He also smoked marijuana – in July 2011 he smoked a half-gram to a gram once a day. He was also making edibles during that time. Benson admitted the pipe found in his yard with holes on either end was used for making concentrated cannabis, but claimed it was made using "nitrogen, CO2, or if you feel the need to make it with butane some patients choose to do it with butane." Benson denied he ever personally used butane with the pipe, although he "had watched people using butane." Benson said the butane found at the Slaughter property was not the correct type of butane for extraction; instead, medical grade butane should be used, which requires additional items that were not at his property.

Benson claimed the concentrated cannabis that was in the jar in the garage was made by nitrogen extraction; he said someone else purchased it and brought it to the property. He did not know how the concentrated cannabis that was in the Pyrex dish in Matteucci's bedroom had been made; he said the dish was brought to the house. Benson admitted he told Hirayama that he purchased the Pyrex dish from the dispensary with the honey oil in it, but denied that he admitted to Hirayama that he used the extraction pipe and butane to manufacture honey oil himself. Instead, he said he told Hirayama he was present during the manufacture of honey oil. Benson testified that he had made honey oil with butane before 2009, but never by himself. He claimed it was part of a "learning experience" and that he had not made honey oil that way since 2009.

Benson denied that he owned the package of marijuana shipped from the FedEx store and said he merely gave his neighbor, P, a ride to the store. Matteucci did not testify at trial.

Other defense witnesses testified regarding collective cultivation. Daniel Bracamontes and David Jones testified they had medical marijuana recommendations and collectively grew marijuana with Benson at the Cedar Brook property. Bracamontes

testified the members of the collective were himself, Michael Rodriguez and Benson. Bracamontes did not contribute any money to the collective, just his labor and time; the materials and plants were provided by someone else. Jones testified that in November 2011, he was in a collective with his son and Benson, and they were growing clones that they planned to divide equally once the clones started rooting.

Dr. Daniel Brubaker testified that he recommended medical marijuana for Benson and his mother, Cindy. He also witnessed Matteucci's designation as Cindy's primary caregiver, which was based on Cindy's severe anxiety and back problems, and because she was considered disabled. Cindy testified that she had grown medical marijuana in the past, but a back surgery prevented her from growing her own marijuana. Matteucci, who is her cousin's son, grew marijuana for her at the Slaughter property, where he lived with Benson. Matteucci drove from Porterville to Cindy's home in Bakersfield at least once a week to help her with "doctor's appointments, groceries, anything I needed." Cindy married in July 2011 and lived with her spouse in Bakersfield. Her spouse was able-bodied, but he worked all the time and did not help her. When Benson and Matteucci were arrested in July 2011, Cindy had been in New Jersey for over a month visiting her younger son and while she intended to return to California, she did not know at the time when she would do so.

Rebuttal

Hirayama testified that in his training and experience, the extraction pipe that was found was used for the butane extraction method of manufacturing honey oil. He had never heard of that kind of pipe being used with nitrogen or CO2.

Hirayama spoke with Cindy by telephone on July 8, 2011. Cindy told him this was the first year marijuana had been grown for her and she was completely unfamiliar with the process of cultivating marijuana. Cindy had not received any marijuana from either Benson or Matteucci. Cindy told Hirayama she was in New Jersey; she had been

there a little over a month and did not have a return date. She did not know how she intended to get the marijuana that was being cultivated for her.

DISCUSSION

I. Overview of California's Medical Marijuana Laws

In California, marijuana is classified as a Schedule I controlled substance. (§ 11054, subd. (d)(13); *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 809.) The state's statutes "specify that, except as authorized or provided by law, it is a crime to possess marijuana (§ 11357), to cultivate, harvest, dry, or process it (§ 11358), to possess it for sale (§ 11359), to transport, import, sell, administer, or furnish it (§ 11360), or to give it away (*ibid*)." (*People v. Dowl* (2013) 57 Cal.4th 1079, 1085 (*Dowl*).)

In 1996, California voters approved Proposition 215, which was codified in section 11362.5 and is known as the Compassionate Use Act (CUA). Section 11362.5, subdivision (d) provides: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

By this and related provisions, the CUA created a "limited defense" for patients and patients' primary caregivers to the crimes of simple possession or cultivation of marijuana. (*Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 952 (*Kirby*).) The narrowly drafted provision applied "solely to qualified patients and their primary caregivers who possess or cultivate marijuana for the patient's personal use." (*People v. London* (2014) 228 Cal.App.4th 544, 551 (*London*), italics omitted.) It neither altered the statutory provisions barring transportation, possession for sale, and sale of marijuana (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773 (*Urziceanu*)) nor provided for the collective cultivation and distribution of marijuana (*id.* at p. 782). To invoke the defense,

a defendant need only introduce at trial evidence that raises a reasonable doubt as to the facts underlying the CUA defense. (*Dowl*, *supra*, 57 Cal.4th at p. 1086; *People v. Mower* (2002) 28 Cal.4th 457, 464, 481.)

"The CUA does not specify an amount of marijuana that a patient may possess or cultivate, but simply imposes the requirement that the marijuana must be for the patient's 'personal medical purposes.' [Citations.] This medical purposes requirement has been judicially construed to mean ' "the quantity possessed by the patient . . . , and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs." ' " (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 267 (*Orlosky*), italics omitted; see *People v. Kelly* (2010) 47 Cal.4th 1008, 1013 (*Kelly*).)

"Despite — or, perhaps, because of — this judicial construction of the CUA, questions persisted for both qualified medical marijuana patients and for law enforcement officers relating to enforcement of and arrest for possession, cultivation, and other related marijuana offenses. In 2003, the Legislature found that 'reports from across the state have revealed problems and uncertainties in the [CUA] that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, have prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act.' " (*Kelly*, *supra*, 47 Cal.4th at pp. 1013-1014.)

In response, the Legislature enacted the Medical Marijuana Program (MMP; § 11362.7 et seq.). (*Dowl*, *supra*, 57 Cal.4th at p. 1086; *Kelly*, *supra*, 47 Cal.4th at p. 1014.) While the MMP did not literally amend the CUA, it did add 18 new code sections that address the CUA's general subject matter. (*Kelly*, *supra*, 47 Cal.4th at p. 1014.) Under the MMP, "those who provide documentation from an 'attending physician' that they have 'been diagnosed with [certain] serious medical condition[s] and that the medical use of marijuana is appropriate' (§ 11362.715, subd. (a)(2)) may obtain an 'identification card that identifies' them as 'a person authorized to engage in the medical use of marijuana' (§ 11362.71, subd. (d)(3))." (*Dowl*, *supra*, at p. 1086.) Such

persons or their designated primary caregivers generally are exempt from "arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article . . . ". (§ 11362.71, subd. (e).)

"The 'amount established pursuant to this article' is addressed in section 11362.77 . . . [which] does two things: (1) it establishes *quantity limitations*, and (2) it sets forth a 'safe harbor' by authorizing possession of medical marijuana within those specific limits." (*Kelly*, *supra*, 47 Cal.4th at p. 1015, fn. omitted.) As our Supreme Court has explained: "Subdivision (a) of section 11362.77 provides that a 'qualified patient' or primary caregiver may '*possess* no more than eight ounces of dried marijuana' and may, '[i]n addition . . . *maintain* no more than six mature or 12 immature marijuana plants.' (*Id.*, subd. (a), italics added.) The next two subdivisions of the same section provide qualified exceptions for even greater amounts. Subdivision (b) specifies that a patent may 'possess an amount of marijuana consistent with the patient's needs,' on condition that the patient 'has a doctor's recommendation' stating that the quantity set out in subdivision (a) is insufficient for the patient's medical needs. Subdivision (c) specifies that cities or counties may retain or enact guidelines allowing greater quantities than those set out in subdivision (a). These aspects of section 11362.77 evidently were designed to provide an objective, bright-line standard in lieu of the subjective, highly individualized reasonable-amount standard set forth in the CUA . . . thereby providing law enforcement officers with uniform standards, and providing patients who meet those standards (and their primary caregivers) with predictability." (*Kelly*, *supra*, 47 Cal.4th at p. 1016, fns. omitted.)

"The MMP's safe harbor provision, subdivision (f) of section 11362.77, authorizes possession of certain amounts of medical marijuana." (*Kelly*, *supra*, 47 Cal.4th at p. 1016.) That subdivision provides: "A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article." (§ 11362.77, subd. (f).)

By its terms, the safe harbor provision applies both to those who hold MMP identification cards and to qualified patients or their primary caregivers, who are entitled to CUA's protections but have not obtained an MMP identification card that may provide protection from arrest.[4] (*Kelly, supra*, 47 Cal.4th at pp. 1016-1017.)

"The MMP further specifies that a person who (1) 'transports or processes marijuana for his or her own personal medical use' (§ 11362.765, subd. (b)(1)) and (2)) either has an identification card or does not have one but is 'entitled to' the CUA's 'protections' (see § 11362.7, subd. (f) [defining 'qualified patient']), 'shall not be subject, on that sole basis, to criminal liability under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away, or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance].' (§ 11362.765, subd. (a).)" (*Dowl, supra*, 57 Cal.4th at p. 1086.)

In addition, in order to effectuate the goal of enhancing the access of patients and caregivers to medical marijuana through collective or cooperative cultivation projects, the MMP includes a provision "stating that '[q]ualified patients . . . [and the designated primary caregivers of qualified patients . . .] who associate . . . in order collectively or cooperatively to cultivate marijuana for medical purposes' are exempt from criminal

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[4] The MMP defines a " 'qualified patient' " as "a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article." (§ 11362.7, subd. (f).) As pertinent here, a " 'primary caregiver' " is defined as "the individual, designated by a qualified patient . . . who has consistently assumed responsibility for the housing, health, or safety of that patient . . .". (§ 11362.7, subd. (d).)

culpability." (*Orlosky*, *supra*, 233 Cal.App.4th at p. 267, fn. & italics omitted; see § 11362.775.[5])

As is apparent from the foregoing, the MMP expanded the affirmative defense to possession and cultivation of marijuana for personal medical purposes available under the CUA. (See § 11362.5, subd. (d); *People v. Wright* (2006) 40 Cal.4th 81, 84; *Kirby*, *supra*, 242 Cal.App.4th at p. 953; *Urziceanu*, *supra*, 132 Cal.App.4th at p. 786.) It made clear, however, that it does not "authorize any individual or group to cultivate or distribute marijuana for profit." (§ 11362.765, subd. (a); see *London*, *supra*, 228 Cal.App.4th at pp. 553-554.) To raise the collective cultivation defense, a defendant need only raise a reasonable doubt about the existence of the defense; once this burden is met, the trial court must provide the instruction and inform the jury the prosecution has the burden to disprove the defense beyond a reasonable doubt. (*Orlosky*, *supra*, 233 Cal.App.4th at p. 269.)

II. Sufficiency of the Evidence

Benson and Matteucci both contend the evidence was insufficient to sustain their convictions on count 4, the manufacture of concentrated cannabis through chemical extraction (§ 11379.6).[6] Matteucci also contends there is insufficient evidence to support his convictions on counts 2, cultivation of marijuana (former § 11358), and 5, possession of concentrated cannabis (former § 11357, subd. (a)), because the amounts of marijuana

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[5] Section 11362.775, subdivision (a) states: "[Q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570."

[6] Neither the CUA nor the MMP provide a defense to a charge under section 11379.6, subdivision (a), of directly or indirectly manufacturing a controlled substance by chemical extraction. (§§ 11362.5, subd. (d), 11362.765, subd. (a), 11362.775; *People v. Bergen* (2008) 166 Cal.App.4th 161, 172, fn. 6 (*Bergen*).)

and concentrated cannabis linked to him were well within the amounts he could legally possess or cultivate as Cindy's primary caregiver.

The applicable legal principles are settled. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 (*Johnson*); accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*Johnson, supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). Before a judgment can be reversed on this ground, "it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support [the verdict]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Thus, "[w]here the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

A. The Manufacture of Concentrated Cannabis

To prove a violation of section 11379.6, subdivision (a), the People must show the defendant (1) directly or indirectly manufactured a controlled substance using chemical extraction, and (2) knew of the substance's nature or character as a controlled substance. (§ 11379.6, subd. (a); CALCRIM No. 2330; *People v. Coria* (1999) 21 Cal.4th 868, 874,

880-881.) The production of concentrated cannabis, known as honey oil or ear wax, through butane oil extraction qualifies as the manufacture of a controlled substance by "chemical extraction" within the meaning of section 11379.6, subdivision (a). (*Bergen, supra,* 166 Cal.App.4th at pp. 164, 169, 172-173.) The jury's instruction in this case was consistent with these elements.

Here, there was sufficient evidence that marijuana in the form of concentrated cannabis had been manufactured at the Slaughter property using the butane extraction method. The tools commonly used in the process were found on the property, namely an extraction pipe capped on both ends, a Pyrex dish, and a razor blade. Marijuana residue on the pipe and concentrated cannabis residue on the dish indicated they had been used to make concentrated cannabis. The raw materials required for the process also were found on the property, namely pressurized canisters of butane and the marijuana growing in the backyard. The end product, concentrated cannabis, was found in a vial in the garage. Taken together, this evidence was sufficient to establish the manufacturing process had occurred. (See, e.g., *People v. Combs* (1985) 165 Cal.App.3d 422, 426-427 (*Combs*) [the presence at the defendant's residence of nearly all of the necessary equipment and materials to manufacture phencyclidine, a violation of section 11379.5, along with a quantity of the substance, "establishes beyond question that the manufacturing process had taken place"].)

The evidence also established both Benson's and Matteucci's involvement in manufacturing concentrated cannabis. As to Matteucci, it was undisputed that he was living in the bedroom where the Pyrex dish, which had a thin layer of concentrated cannabis on it, the razor blade, and the butane canisters were found. Matteucci apparently had access to the other areas of the premises, which would include the storage room where the extraction pipe was located and the garage where the vial with the concentrated cannabis was found. Moreover, Matteucci admitted he tended the marijuana plants that were growing in the backyard. " 'The inference of dominion and

control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence . . . ' " (*People v. Small* (1988) 205 Cal.App.3d 319, 326.) The evidence, considered cumulatively, was sufficient to prove that Matteucci had access to all of the items necessary to produce concentrated cannabis by the butane extraction method, and that he participated in its production.

The evidence likewise was sufficient to connect Benson to concentrated cannabis production. Benson and his family were living at the property, and he certainly had control of the entire premises, including the tools and materials needed to produce concentrated cannabis by butane extraction, as well as the vial in which concentrated cannabis was found. Moreover, in his "559 Style Ear Wax" video, Benson displays "ear wax," or concentrated cannabis, on a Pyrex dish. These facts sufficiently prove Benson was knowingly involved in concentrated cannabis production by butane extraction.

Benson asserts that courts have found sufficient evidence to support a conviction for violating section 11379.6 only where there was "some evidence" of "an ongoing manufacturing process that had commenced with an initial step." While he concedes there was evidence suggesting concentrated cannabis may have been manufactured at the Slaughter property sometime in the past, he claims there was no evidence he "was currently engaged in any stage – from inception to completion – of unlawfully manufacturing a controlled substance."[7] Benson asserts that without such evidence, his conviction cannot stand.

We do not agree with Benson's suggestion that the statute cannot apply unless there is evidence of recent manufacturing activity. Section 11379.6 is violated if a person "manufactures" a controlled substance by chemical extraction. The statute embraces "every stage of the process for manufacturing . . . from inception through completion."

[7] Matteucci joins in Benson's argument to the extent it supports his own claim of insufficient evidence to support his conviction for manufacturing concentrated cannabis.

(*People v. Stone* (1999) 75 Cal.App.4th 707, 715 (*Stone*); see also *Combs*, *supra*, 165 Cal.App.3d at p. 427 [the presence of nearly all the equipment and materials needed to manufacture a controlled substance, along with a quantity of the actual substance, "establishes beyond question that the manufacturing process had taken place"].) Consistent with the statute, the jury here was instructed that to find defendants guilty of this crime, the People must prove a defendant "*manufactured* a controlled substance, specifically marijuana[,] using chemical extraction or independent chemical synthesis." As we have explained, there is sufficient evidence to show that Benson and Matteucci manufactured concentrated cannabis by butane extraction.

Although Benson recognizes that section 11379.6 applies when the manufacturing process has been completed, he nevertheless contends there is nothing in the statute or any published opinion interpreting it that suggests the statute may be applied where the evidence suggests only that marijuana may have been manufactured "at some time in the unknown past." The statute, however, does not state that the manufacturing must have occurred within a particular time and the cases Benson cites do not purport to establish such a limitation. (*People v. Luna* (2009) 170 Cal.App.4th 535, 542; *Bergen*, *supra*, 166 Cal.App.4th 161, 169, 171; *People v. Pierson* (2001) 86 Cal.App.4th 983, 990; *Stone*, *supra*, 75 Cal.App.4th at pp. 713-714; *People v. Heath* (1998) 66 Cal.App.4th 697, 705; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 812-813; *People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503-1504; *Combs*, *supra*, 165 Cal.App.3d at p. 427.)

In short, sufficient evidence supported defendants' convictions for violating section 11379.6 because all of the equipment and raw materials necessary to manufacture concentrated cannabis, as well as some concentrated cannabis itself, were found in their home.

B. The Primary Caregiver Defense

Matteucci contends his status as Cindy's primary caregiver rendered the evidence insufficient to convict him of either marijuana cultivation (former § 11358) or possession of concentrated cannabis (former § 11357, subd. (a)).

The CUA and MMP both create defenses against marijuana cultivation and possession charges for primary caregivers. (§§ 11362.5, subd. (d), 11362.765, subds. (a) & (b)(2), 11362.775.)[8] The general description of a primary caregiver, found in both the CUA and MMP, has two parts: (1) a medical marijuana patient has designated an individual as his or her primary caregiver (the designee clause); and (2) the individual " 'has consistently assumed responsibility for the housing, health, or safety' " of the patient (the responsibility clause). (*People v. Mentch* (2008) 45 Cal.4th 274, 283 (*Mentch*); *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1015-1016.) Our Supreme Court has determined that to satisfy the responsibility clause, "a defendant asserting primary caregiver status must prove, at a minimum, that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana." (*Mentch, supra*, at p. 283.) The defense does not apply where the provision of marijuana is itself the substance of the relationship. (*Id.* at p. 287.)

Here, there was sufficient evidence to establish that Matteucci was not Cindy's primary caregiver within the meaning of the statutes. While the evidence established the first prong of the defense, i.e. that Cindy, who had a recommendation for medical marijuana, had designated Matteucci as her primary caregiver, the record is bereft of

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[8] The CUA and MMP contain the same definition of primary caregivers, namely an individual designated by a medical marijuana patient "who has consistently assumed responsibility for the housing, health, or safety" of that patient. (§§ 11362.5, subd. (e), 11362.7, subd. (d).) The jury was instructed with both the CUA defense and the MMP defense, and given the statutory definition of "primary caregiver."

evidence establishing the second prong, i.e. that Matteucci "assumed responsibility for [Cindy's] housing, health or safety." Matteucci told Hirayama after the July 2011 search that the only thing he did for Cindy was to care for her marijuana plants, and the last time he had seen Cindy was a month prior, when she came to the Porterville area. Cindy's testimony that Matteucci drove from Porterville to Bakersfield at least once a week to help her with doctor's appointments, medication, groceries, and other things, even if believed, does not establish that Matteucci provided her with consistent caregiving or assumed responsibility for her housing, health or safety. Without such evidence, Cindy's designation of Matteucci as her primary caregiver has no legal effect and does not provide a defense to Matteucci.

Matteucci claims *Mentch* was wrongly decided, as it narrowly restricts the term "primary caregiver" by requiring a caregiver to do more than grow and provide marijuana to a medical marijuana patient. He asserts the Supreme Court's interpretation of section 11362.5, subdivision (e) violates his and Cindy's constitutional rights to equal protection of the law, and he intends to request the Supreme Court to reconsider *Mentch*. As Matteucci recognizes, we are obligated to follow the decision in *Mentch*, so we must reject his challenge. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In sum, based on the evidence, a reasonable juror could find beyond a reasonable doubt that Matteucci was not Cindy's primary caregiver, and therefore convict him of cultivation of marijuana and possession of concentrated cannabis.

III. Instructional Errors

Defendants contend the trial court committed error in its instructions on their collective cultivation defense and in defining "marijuana." We consider each alleged error in turn, and conclude defendants are not entitled to reversal.

We review a claim of instructional error de novo. (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 759.) " ' "[T]he correctness of jury instructions is to be determined

from the entire charge of the [trial] court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) When an instruction is ambiguous, " ' "the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." ' " (*People v. Moore* (2011) 51 Cal.4th 1104, 1140 (*Moore*).) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

A. The Collective Cultivation Defense

Defendants argue the trial court's jury instruction on their collective cultivation defense erroneously placed the burden on them. Defendants based their defense on section 11362.775, which provides that qualified patients and their primary caregivers who associate within the state "in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." At trial, defendants raised section 11362.775's collective cultivation defense (MMP defense) and presented evidence supporting it.

Both the defense and the prosecution proposed special instructions on the defense. Benson's attorney objected to the prosecution's instruction, arguing it improperly shifted the burden of proof to him.[9] The trial court ultimately adopted the prosecution's

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[9] Matteucci's attorney never objected to the instruction or joined in Benson's objection. Matteucci nevertheless asserts that he may challenge the instruction on appeal, along with Benson, because he has not forfeited the issue and if he has, his trial attorney was ineffective for failing to object. We agree with Matteucci that he has not forfeited the issue. We review any claim of instructional error that affects a defendant's substantial rights whether or not there was an objection at trial. (See Pen. Code, § 1259 ["[t]he appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Myles* (2012) 53 Cal.4th 1181, 1219, fn. 12 [forfeiture rule does not apply when "the court gives an instruction that incorrectly states the law"]; *People v. Denman* (2013) 218 Cal.App.4th 800, 812 ["[w]hen the trial court gives an

instruction, after modifying the burden of proof language, and instructed the jury as follows:

"Under the Medical Marijuana Program Act (MMPA), qualified patients and the designated primary caregivers of qualified patients, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, or 11360.

"This defense can apply to the crimes of Cultivation, Transportation, and Possession for Sale of Marijuana, and Possession of Concentrated Cannabis. It *requires that a defendant show any evidence* that members of the collective or cooperative:

"(1) are qualified patients for whom marijuana has been approved or recommended by a physician for medicinal purposes;

"(2) collectively or cooperatively associate to cultivate marijuana; and

"(3) are not engaged in a profit-making enterprise.

"The collective or cooperative association required by the act need not include active participation by all members in the cultivation process but may be limited to financial support by way of marijuana purchases from the organization.

"The MMPA does not authorize any individual or group to cultivate or distribute marijuana for profit. In considering whether a collective or cooperative is nonprofit, you may consider the testimony of the operators of the enterprise, its formal establishment as a nonprofit organization, the presence or absence of any financial records, the presence or

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incorrect or incomplete instruction that allegedly affects the substantial rights of a defendant, it is reviewable even if no objection was raised in the trial court"].) We cannot determine whether Matteucci's substantial rights were affected without deciding if the instruction given was erroneous and, if so, whether the error was prejudicial. Therefore, we must review the merits of Matteucci's challenge to the trial court's instruction.

absence of processes by which the enterprise is accountable to its members, the size of the enterprise's membership, and the volume of business it conducts.

"Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses.

"*The People have the burden of proving beyond a reasonable doubt that the defendants' conduct was not authorized under the Medical Marijuana Program Act (MMPA). If the People have not met this burden, you must find the defendants not guilty.*"[10] (Italics added.)

On appeal, defendants contend the jury should not have been instructed on their burden to "show any evidence," relying on Justice Chin's concurring opinion in *Mentch*, *supra*, 45 Cal.4th 274. There, Justice Chin suggested that because "the defendant's burden [as to a compassionate use defense] is only to produce evidence under Evidence Code 110, and that once the trial court finds the defendant has presented sufficient evidence to warrant an instruction on the defense, the defendant has fully satisfied this burden; accordingly, the court should not instruct the jury on any defense burden." (*Id.* at p. 293 (conc. opn. of Chin, J.).) Defendants argue the instruction here, by stating that they were required to "show any evidence[,]" shifted the burden of proof to them and permitted the prosecutor to obtain a conviction based on a standard less than a reasonable doubt.

We agree with the People that any confusion created by the instruction was cured by other instructions. The jury was instructed with CALCRIM No. 220, the general

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[10] At the time of trial, CALCRIM did not include a pattern instruction on the MMP's collective cultivation defense. After trial, CALCRIM No. 3413 was adopted, which lists the elements of the defense, and includes instruction on the People's burden to prove beyond a reasonable doubt that the defendant was not authorized to cultivate marijuana for medical purposes. The instruction does not state that the defendant is required to make any showing in order to invoke the defense.

instruction on the People's burden to prove a defendant guilty beyond a reasonable doubt and the definition of that standard. Several other instructions reiterated the People's burden, including the challenged instruction itself. That instruction did not impose a burden of proof on defendants, only a burden of production, as the instruction stated the defendants were required to "show any evidence." Moreover, the instruction concluded with the statement that the People had "the burden of proving beyond a reasonable doubt" the defendants' conduct was not authorized under the MMP, and if the People did not meet this burden, the jury "must find the defendants not guilty." Thus, even if the portion of the instruction about what the defendants were required to show might have confused the jury, the portion about the People's burden correctly established the prosecution bore the ultimate burden of proving, beyond a reasonable doubt, that the defendants' conduct was unlawful, and therefore the collective cultivation instruction did not apply. Reading the instructions as a whole, we conclude there is no reasonable likelihood the jury misunderstood the challenged instruction to reduce the People's burden of proof or impose a burden on defendants that they did not have. (*Moore*, *supra*, 51 Cal.4th at p. 1140.)

Even if there were error, it was harmless beyond a reasonable doubt under either the *Chapman*[11] or the more lenient *Watson*[12] harmless error standard. The MMP defense applied only if the defendants did not earn a profit from their cultivation, distribution, or sale of marijuana, and it applied to Matteucci only if he was Cindy's primary caregiver. (§ 11362.765, subd. (a); *London*, *supra*, 228 Cal.App.4th at pp. 553-554.)

The evidence that defendants were involved in a profit-making enterprise was overwhelming. The YouTube videos show Benson displaying marijuana buds and offering them for sale. Benson and Matteucci were growing 131 marijuana plants that

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[11] *Chapman v. California* (1967) 386 U.S. 18.

[12] *People v. Watson* (1956) 46 Cal.2d 818.

ranged from four to seven feet tall at the Slaughter property, along with 351 small marijuana clones. They possessed a trim reaper, typically found on large cultivation sites, that could be used to trim marijuana buds. Two digital scales, that usually indicate the sale of marijuana, were found in the house, one with marijuana residue on it. Two vacuum sealers that could be used to store marijuana by vacuum sealing were also found. The 482 marijuana plants, if grown to maturity, would produce vastly more marijuana than Benson's and Cindy's recommendations. Although Benson claimed he was reimbursed only for his expenses, he did not keep close track of his expenses and accepted monetary "donations" without regard to whether the amount covered overhead costs and operating expenses. (*London*, *supra*, 228 Cal.App.4th at p. 556.) In addition, as we have already explained, the evidence did not establish Matteucci's status as Cindy's primary caregiver.

In light of the evidence of Benson's and Matteucci's extensive and elaborate marijuana grow operation, the evidence that showed Matteucci was not Cindy's primary caregiver, and the jury's finding that Benson possessed the marijuana for sale, any error in the instructions on the MMP defense was " ' "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." ' " (*People v. Pearson* (2013) 56 Cal.4th 393, 463 [when instructional error violates the United States Constitution, the *Chapman* standard requires the People, in order to avoid reversal, to prove beyond a reasonable doubt that the error did not contribute to the verdict].) Based on the evidence, "it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict" regardless of any error the trial court made in instructing the jury on the MMP defense. (See *People v. Bryant* (2014) 60 Cal.4th 335, 395 [When applying the *Chapman* standard, the court asks " ' "whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error" ' "].)

B. The Definition of Marijuana

Defendants also claim the trial court erred when it declined Benson's request to instruct the jury on the definition of marijuana contained in section 11362.77, subdivision (d) (hereafter section 11362.77(d)) of the MMP.[13]

The jury was given the standard CALCRIM instructions that delineate the offenses of unlawful marijuana transportation, cultivation, and possession, and include a definition of marijuana derived from the general definitions section of the Health and Safety Code. (See CALCRIM Nos. 2361, 2370, 2352, 2375; §§ 11000, 11018.) This definition generally states that marijuana can include all parts of the plant, with some exceptions such as stalks and certain types of seed derivatives.[14] In contrast, section 11362.77(d) contains a narrower definition of marijuana that confines it to "dried mature processed flowers" of the plant. Over defense objection, the trial court declined Benson's attorney's request to instruct the jury on this narrow definition. Consequently, the jury instruction on the MMP defense did not contain the section 11362.77(d) definition of marijuana.

Defendants contend the trial court was obligated to instruct the jury on the section 11362.77(d) definition of marijuana because it was a legally correct instruction on their theory of the case, i.e. that their activities constituted collective cultivation of

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[13] Matteucci joins with Benson in arguing the trial court erred in failing to give the requested instruction. While only Benson's attorney requested the instruction, we consider Matteucci's argument for the same reason we considered his argument with respect to the first claim of instructional error.

[14] The jury was instructed: "*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of generation."

medical marijuana within the meaning of section 11362.775 of the MMP. (*People v. Granados* (1957) 49 Cal.2d 490, 496 [trial court erroneously refused instruction that accurately stated the law and pinpointed the defense's theory]; see *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [trial court required to give pinpoint instruction upon request when there is evidence to support the theory].) We disagree, as the trial court correctly ruled the narrower definition of marijuana was not applicable to this case.

Section 11362.77 of the MMP provides that a qualified patient may "possess no more than eight ounces of dried marijuana[,]" and "maintain no more than six mature or 12 immature marijuana plants[,]" unless a doctor recommends that this quantity does not meet the patient's medical needs. (§ 11362.77, subds. (a) & (b).)[15] It is this section that contains the narrower definition of marijuana: "*Only the dried mature processed flowers* of female cannabis plant or the plant conversion *shall be considered when determining allowable quantities of marijuana under this section*." (§ 11362.77, subd. (d), italics added.) "By its plain terms, section 11362.77's narrower marijuana definition applies only 'when determining allowable quantities of marijuana *under this section*' (*id.*, subd. (d), italics added), that is, when determining the eight-ounce limitation set forth in section 11362.77." (*Orlosky, supra,* 233 Cal.App.4th at pp. 277-278.) It is apparent that since the narrower definition includes only dried flowers, it cannot apply to the live mature and immature marijuana plants that subdivision (a) of that section allows a qualified patient or primary caregiver to maintain.

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[15] These subdivisions of section 11362.77 state: "(a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient. [¶] (b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs."

Defendants' MMP defense did not involve the eight-ounce limitation set forth in section 11362.77. Instead, it involved whether defendants were collectively cultivating, or growing, marijuana for medical purposes. (§ 11362.775; see CALCRIM No. 3413 [defining "cultivate" for purposes of the collective cultivation defense as "foster[ing] the growth of a plant"].) The narrow definition used to determine allowable quantities under section 11362.77, namely the "dried mature processed flowers" of the plant, cannot apply to plants being cultivated, as they are necessarily live plants.

Defendants complain that because the narrow definition of marijuana was not given, the prosecutor was able to argue at trial that the members of the collective were cultivating more marijuana than was reasonably related to their current medical needs based on the immature plants they were growing. Defendants seem to believe that if the definition of marijuana is limited to dried processed flowers or mature plants when asserting an MMP defense, they would not be guilty if they were cultivating only immature plants. They are wrong. If defendants are correct and the narrow definition of section 11362.77(d) applied to allowable quantities under the MMP defense, then the defense would apply only to dried mature processed flowers, not to immature plants that generally are illegal to transport, cultivate, or possess under former sections 11357, 11358, 11359, and 11360. In that situation, if a collective together possessed dried processed flowers or mature plants for which the members had valid recommendations, but also grew immature marijuana plants, the MMP defense would apply to the dried flowers and mature plants, but not to the immature plants, which would be unprotected from state prosecution. (See, e.g., *Mentch*, *supra*, 45 Cal.4th at p. 289 [primary caregiver defense only protects the caregiver's actions in providing marijuana to a qualified patient for whom the caregiver was the designated primary caregiver; the defense does not extend to marijuana the caregiver sells to others.].) Under that scenario, defendants would be subject to prosecution for the immature plants they were growing and could not invoke the MMP defense.

In sum, section 11362.77(d)'s narrow definition of marijuana was not a correct statement of the law as applied to defendants' MMP defense. Accordingly, the trial court did not err in refusing to give the instruction. (*People v. Mackey* (2015) 233 Cal.App.4th 32, 111.) Moreover, even if the instruction should have been given, the error was harmless for the reasons stated in section III(A) – the evidence that the group was engaged in a profit-making enterprise and that Matteucci was not Cindy's primary caregiver was overwhelming.

IV. Sentencing

A. Proposition 47

Matteucci was convicted and granted probation in this case on October 30, 2014. On November 4, 2014, voters enacted Proposition 47, also known as "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47), which became effective the next day. (Cal. Const., art. II, § 10, subd. (a).) The statutes enacted by the passage of Proposition 47 classify as misdemeanors certain drug-related offenses that were previously defined as felonies or wobblers, i.e. crimes punishable as either felonies or misdemeanors at the trial court's discretion. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.)

Proposition 47 created a resentencing provision, Penal Code section 1170.18, pursuant to which any person currently "serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act [Proposition 47] had [it] been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case…." (Pen. Code, § 1170.18, subd. (a).) Eligible parties may also petition for the redesignation of their felony drug convictions to misdemeanors. (*Id*., subd. (f).) Petitions can only be filed by persons convicted of the offenses downgraded by Proposition 47, and relief will be denied if they also have convictions for serious, violent, or specified sex-related felonies. (Pen. Code, § 1170.18, subd. (i).) Even then, the court has the

discretionary power to deny a petition if "resentencing the petitioner would pose an unreasonable risk of danger to public safety," a conclusion the court may draw from the petitioner's "criminal conviction history," "disciplinary record and record of rehabilitation while incarcerated," and "[a]ny other evidence the court . . . determines to be relevant." (*Id*., subd. (b).)

Matteucci asserts his felony possession of concentrated cannabis conviction has been rendered a misdemeanor pursuant to Proposition 47. He further asserts he is not required to file a petition to recall his sentence in superior court under Penal Code section 1170.18. Instead, he argues he is entitled to automatic resentencing because Proposition 47 was enacted before the judgment in his case was final, citing *In re Estrada* (1965) 63 Cal.2d 740, and even if not, we should remand the case to the trial court for a hearing on the merits of his Proposition 47 claim without the need to file a petition.

In *People v. Bradshaw* (2016) 246 Cal.App.4th 1251 (*Bradshaw*), we observed that "[s]everal cases have held Proposition 47 does not provide for automatic resentencing of a defendant currently serving a felony sentence and is not automatically applicable to those whose judgments are not yet final." (*Bradshaw*, *supra*, 246 Cal.App.4th at p. 1257, citing *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 924-925, *People v. Shabazz* (2015) 237 Cal.App.4th 303, 307, 312-314 (*Shabazz*), *People v. Noyan* (2014) 232 Cal.App.4th 657, 672.) We expressly agreed "with the reasoning and conclusion of these opinions, which limit defendants to the statutory remedy, set forth in [Penal Code] section 1170.18, of petitioning for recall of sentence (*id*., subd. (a)) or applying for designation of felony convictions as misdemeanors (*id*., subd. (f)), as appropriate, in the trial court once the judgment is final." (*Bradshaw, supra*, at p. 1257.)

Matteucci encourages us to depart from this precedent, asserting it is clear he is entitled to relief since he has no prior criminal record, his crime is covered by Proposition 47, and there is nothing in the record to show he is a danger to the public.

But as we have recently held, the dangerousness determination should occur after both the People and the defendant are permitted to address the issue. (*People v. Bunyard* (2017) 9 Cal.App.5th 1237, 215 Cal.Rptr.3d 628, 635, citing *Bradshaw, supra,* 246 Cal.App.4th at p. 1258; *Shabazz, supra*, 237 Cal.App.4th at pp. 313-314.)[16] Accordingly, we decline Matteucci's invitation to reach a different result.

B. Failing to sentence on out-on-bail allegation

The People assert that remand of Benson's case is necessary because the trial court failed to sentence him on the out-on-bail special allegation. The information included a special allegation charging Benson with committing count 1, transportation of marijuana, while out on bail, in violation of Penal Code section 12022.1. This special allegation provides for a consecutive two-year term of imprisonment. (Pen. Code, § 12022.1, subd. (b).) Benson admitted the special allegation before trial began.

In the probation officer's report prepared for Benson's sentencing, the probation officer recommended that Benson be given a suspended prison term of four years, four months, which included a three year base term on count 4, the manufacture of concentrated cannabis, and a concurrent three year term on count 1, transportation of marijuana, with the section 12022.1 two-year enhancement stayed.

At the sentencing hearing, the trial court declined to follow the recommendation and instead stated it was going to give Benson the aggravated term suspended, as it believed this was an aggravated case that involved a "blatant violation of the marijuana laws" and based on the videos, Benson deserved an aggravated term. The trial court stated that while it was not going to send him to prison at that time, "if he violates the law in any way I will send him to state prison gladly." The prosecutor then pointed out an

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[16] We note that the issue of whether Proposition 47 applies retroactively to a defendant who was sentenced before its effective date but whose judgment was not final until after that date is pending before the California Supreme Court in *People v. DeHoyos* (2015) 238 Cal.App.4th 363, review granted September 30, 2015, S228230.

error in the probation officer's report, which listed the Penal Code section 12022.1 enhancement as being found true by a jury instead of being admitted before trial. The trial court sentenced Benson to an aggravated seven year term on count 4; a consecutive eight month, or one-third the midterm of one year, term on count 1; and consecutive eight month sentences on the remaining counts. The trial court suspended execution of the sentence for five years. The trial court did not impose any sentence on the Penal Code section 12022.1 enhancement, or state on the record whether it was staying or striking it. The minute order also does not mention a judgment on the enhancement.

Penal Code section 12022.1 provides for an enhanced sentence when a defendant commits a felony while released on bail or his own recognizance after being charged with a previous felony. In such cases, the defendant "shall be subject to a penalty enhancement of an additional two years [in state prison], which shall be served consecutive to any other term imposed by the court." (Pen. Code, § 12022.1, subd. (b).) Additionally, subdivision (e) provides that, if the defendant is sentenced to prison on the first-charged felony and convicted of the subsequently committed felony (or "secondary offense"), "any [state prison] sentence for the secondary offense shall be consecutive to the primary sentence."

Penal Code section 1385, subdivision (a) authorizes a judge to dismiss an action on its own motion "in furtherance of justice," and requires the reasons for dismissal to be stated orally on the record. A trial court has discretion under Penal Code section 1385 to strike an admitted Penal Code section 12022.1 enhancement, but not to stay it. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1156, 1165; *People v. Jones* (2007) 157 Cal.App.4th 1373, 1382-1383.) "The failure to impose or strike an enhancement is a legally unauthorized sentence. . . . " (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.)

Here, the record is silent on whether the trial court intended to impose or strike the Penal Code section 12022.1 enhancement. While the probation officer recommended it be stayed, that is not an authorized sentence. Benson contends we should infer the trial

court intended to strike the enhancement since it did not follow the probation officer's recommended sentence and omitted reference to the enhancement while pronouncing sentence, citing *In re Candelario* (1970) 3 Cal.3d 702, 706. We do not believe a reasonable inference can be made that the trial court intended an act of leniency, however, in light of its statements that it found Benson's crimes to be aggravated. Accordingly, the case must be remanded for the trial court to exercise its discretion to either strike or impose the on-bail enhancement.

DISPOSITION

Benson's case is remanded for resentencing to allow the superior court to consider whether the Penal Code section 12022.1 enhancement should be stricken under Penal Code section 1385 or imposed. In all other respects, Benson's and Matteucci's judgments are affirmed.

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GOMES, Acting P.J.

WE CONCUR:

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PEÑA, J.

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SMITH, J.